IN THE

Supreme Court of the United States

OCTOBER TERM, 1976 **76-939**

No. ....., Misc.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; and
BELL TELEPHONE LABORATORIES, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION TO ACCELERATE CONSIDERATION AND BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

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January 6, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

15333-1-77

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MOTION TO ACCELERATE CONSIDERATION

Now come petitioners and respectfully move the Court to accelerate consideration of their motion for leave to file a petition for writ of certiorari and of the petition accompanying that motion which seeks issuance under 28 U.S.C. § 1651(a) of a writ of certiorari directly to the United States District Court for the District of Columbia or, in the alternative, issuance under 28 U.S.C. § 1254(1) of a writ of certiorari to the United States Court of Appeals for the District of Columbia before judgment, the object in both cases being to obtain review in this Court of a Memorandum Opinion and Order on Jurisdictional Issues issued by the district court on November 24, 1976, and a subsequent order of that court issued on December 22, 1976,

as soon as is reasonably possible. Specifically, petitioners request the Court: (1) to grant the motion for leave to file a petition for writ of certiorari under 28 U.S.C. § 1651(a); (2) to accept the petition for certiorari as petitioners' brief on the merits of the question presented; (3) to set a date for the Government to file its brief on the merits; and (4) to set this case for argument as soon as is reasonably possible in this Term of Court. In support of this motion, petitioners submit herewith their Brief in Support of Motion to Accelerate Consideration.

Respectfully submitted,

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BRIEF IN SUPPORT OF MOTION TO ACCELERATE CONSIDERATION

STATEMENT

This case involves a civil antitrust complaint brought by the Antitrust Division of the Department of Justice acting on behalf of the United States against three of the companies that comprise what is commonly known as the Bell System, an integrated enterprise that provides most of the telecommunications common carrier service throughout the continental United States. The basic charges set forth in the Government's complaint are that the Bell System has monopolized, and attempted and conspired to monopolize, alleged telecommunications service and equipment markets.

Although the markets involved are not precisely identified in the complaint, it is clear that the Government's charges are directed exclusively at areas in

which, and services and equipment with respect to the provision of which, the Bell System operates solely as a common carrier enterprise. Moreover, the specific charges made in the complaint and identified by the Government in the proceedings before the district court as the grounds for its basic monopolization charges all relate to the Bell System's common carrier activities.

In light of the nature of the charges involved, petitioners challenged the jurisdiction of the district court over the Government's complaint, pointing out that the matters encompassed therein are subject to pervasive regulation by both federal and state regulatory agencies, that the public interest standard of this pervasive regulatory scheme is fundamentally different from and inconsistent with the unidimensional standard of competition embodied in the antitrust laws, that the regulatory jurisdiction and responsibility thus established has been and is being vigorously exercised with respect to the very matters alleged in the complaint, and that under this Court's decisions in *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 296 (1963); *Hughes Tool Co.* v. *Trans World Airlines, Inc.,* 409 U.S. 363 (1973), and *United States* v. *National Association of Securities Dealers, Inc.,* 422 U.S. 694 (1975), the antitrust jurisdiction of the federal courts does not extend to matters subject to pervasive regulation under a standard inconsistent with the competition standard of the antitrust laws.

The district court rejected this challenge to its jurisdiction. On the authority of this Court's decisions in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973), and *United States* v *Radio Corp. of America,* 358 U.S. 334 (1959), the court held that even a pervasive scheme of regulation "does not automatically necessitate the conclusion that the antitrust laws are

to be displaced." (Petition, App. A, p. 7a). The court conceded that the decision in the *NASD* case makes it clear that "a regulatory scheme may be so pervasive that it must displace the antitrust laws" (*id.*). However, apparently on the theory that regulation of telecommunications common carriers is somehow less pervasive than the regulation of securities dealers involved in the *NASD* case, the court refused to apply that principle to this case.

In petitioners' judgment, the decision of the district court is demonstrably erroneous. The decisions of this Court in *Otter Tail Power* and *Radio Corporation of America* were premised on the fact that pervasive common carrier regulation did *not* exist with respect to the industries and activities involved in those cases. Indeed, the entire thrust and reasoning of the Court's opinions was that had the activities involved in those cases been subject to such regulation, the antitrust laws would not have been applicable under the principle of *Pan American, Hughes* and *NASD.* Since the Bell System's telecommunications common carrier activities are subject to pervasive common carrier regulation, that principle is plainly applicable here, for, contrary to the implication of the district court in distinguishing *NASD*, telecommunications common carrier activities are *more* pervasively regulated than any of the activities involved in any of the cases that have previously come before this Court. In fact, an analysis of the major regulatory statutes demonstrates that Title II of the Communications Act, together with comparable state statutes preserved in and made a part of federal policy thereby, establishes the most pervasive regulatory scheme applicable to any industry in the country. (These considerations are summarized in the petition, at pp. 34-37.)

While it was considering the issue of its jurisdiction, the district court had stayed all discovery in this case on its own motion in recognition of the fact that such "threshold matters . . . should be resolved before the expensive and protracted discovery inherent in the nature of this case was undertaken by the parties" (Petition, App. A, p. 2a). That stay has now been lifted, however, and the parties are about to commence what is virtually certain to be at least a ten-year period of discovery and trial. The burdens of discovery and trial in this case would be staggering; petitioners initially received document requests from the Government which would require the production of some *1.2 billion* pages of material at an estimated cost to petitioners *in excess of $300 million*. Moreover, the pendency of this case during the many years certain to be required to prepare and try it would seriously impair the ability of petitioners to carry out their responsibilities under the regulatory scheme to which they are subject. In addition, there are now pending against the Bell System companies more than thirty other antitrust actions in seven different judicial circuits around the country. Each of these cases involves one or more of the same charges that have been made by the Government in this case and therefore involves the same jurisdictional question that is presented here. (These considerations are discussed more fully in the petition, pp. 26-31.)

For all these reasons, it is imperative that a definitive review and resolution of the district court's assertion of jurisdiction be obtained as soon as possible. Because of the provisions of Section 2 of the Expediting Act (15 U.S.C. § 29), which are applicable to civil antitrust cases brought by the Government, an interlocutory appeal cannot be taken from the district court's decision. However, this Court has jurisdiction under

the All Writs Act (28 U.S.C. § 1651(a)), to review that decision in aid of its ultimate appellate jurisdiction. *United States Alkali Export Association, Inc.* v. *United States*, 325 U.S. 196 (1945); *Far East Conference* v. *United States*, 342 U.S. 570 (1952). See also *Ex parte Peru*, 318 U.S. 578 (1943).

There is a possibility, in view of certain 1974 amendments to the Expediting Act, that the Court of Appeals for the District of Columbia also has jurisdiction under the All Writs Act to review the district court's decision. See *Kaufman* v. *Edelstein*, 1976-1 Trade Cases ¶ 60,841 at 68,668 (2d Cir. 1976). However, given the lengthy delay that has already been experienced in this case while the district court considered the question of its jurisdiction, coupled with the basic policy of the Expediting Act itself that Government civil antitrust cases should proceed as expeditiously as possible, the interests of sound judicial administration would best be served by direct review in this Court. The importance of this particular litigation, the wholly legal character of the jurisdictional question presented here, and the need for a definitive resolution of that question all lead inexorably to the conclusion that the question ultimately must be resolved by this Court. That being so, petitioners submit that such a definitive resolution of the question ought to be made as soon as possible.

For that reason, petitioners have filed a petition for writ of certiorari under the All Writs Act directly in this Court. Petitioners have also filed a petition for writ of certiorari in the Court of Appeals for the District of Columbia but, with respect to that petition, petitioners have asked in the petition filed in this Court that the Court grant certiorari before judgment in the court of appeals. Under 28 U.S.C. § 1254(1), this Court has jurisdiction to review cases filed in the

court of appeals under 28 U.S.C. § 1651(a), *Schlagenhauf* v. *Holder*, 379 U.S. 104 (1964), and the provisions of the section expressly permit such review before judgment. See *United States* v. *Nixon*, 418 U.S. 683 (1974); *New Haven Inclusion Cases*, 399 U.S. 392 (1970). By this approach, petitioners have presented this Court with alternative procedures under either of which it unquestionably has the power directly to review the district court's decision.

This motion to accelerate consideration is designed to facilitate even greater expedition in the handling of the question sought to be presented here. By this motion, petitioners ask the Court to grant the motion for leave to file the petition for writ of certiorari, to accept the petition as petitioners' brief on the merits, to establish a date on which the Government should file its brief and to set this case for argument as soon as is reasonably possible. For the reasons to be set out below, this Court should grant petitioners' motion to accelerate consideration.

ARGUMENT

The procedure urged by petitioners in this motion has a single purpose—that is, to permit consideration and resolution of the question presented by the petition for writ of certiorari in this case during this Term of Court. Plainly, such a procedure is in the best interests of the parties, since prompt resolution of the question presented would avoid the enormous burdens of a possibly unnecessary discovery and trial in the case. It is in the best interests of the non-parties who inevitably will be drawn into this case by subpoenas and upon whom substantial burdens would therefore also necessarily be imposed. It is in the best interests of the public, which, because the Bell System is a regulated public utility enterprise, will ultimately bear the

expenses of both sides of this litigation. It is in the best interests of the courts, the time and resources of which are being spent on this and related cases pending against the Bell System, even though no one can know whether those cases belong in the courts at all, unless and until there is a definitive resolution of the question of the applicability of the antitrust laws to the pervasively regulated common carrier activities of the Bell System. And finally, it is in the best interests of the regulatory agencies charged with the responsibility of regulating telecommunications common carriers, both state and federal. Those agencies need and are entitled to know—as promptly as possible in light of the fact that proceedings are currently pending before them involving the very matters sought to be litigated in this case—the relationship between their regulatory responsibilities and the jurisdiction of the antitrust courts and, even more importantly, the relationship between the public interest standard they administer and the competition standard embodied in the antitrust laws.

Petitioners submit that the procedure suggested by this motion is entirely justified and appropriate in this extraordinary case. In light of the multiplicity of similar suits now pending, the burden upon judicial resources from the continued discovery and trial procedures in those suits, the staggering burden of discovery in this case alone which is scheduled to commence March 1, 1977, and the uncertainty that exists and will continue to exist with respect to petitioners' regulatory obligations in light of the district court's opinion, the need for a prompt and definitive resolution of the question presented by this petition is clear.

This Court has on numerous occasions accelerated consideration of matters pending before it where it believed the circumstances involved to require or justify

such action. Indeed, in the *Penn-Central Merger and N&W Inclusion Cases,* 389 U.S. 946, 947 (1967) the Court adopted essentially the identical procedure suggested here.

The need for accelerated consideration is far more imperative in the present case, from the standpoint of the parties, the public, the courts, and the regulatory agencies involved. The procedure suggested by petitioners will satisfy that need, and it will do so in a manner that is manifestly appropriate in light of the background of this case. The parties have briefed the jurisdictional question presented in the petition thoroughly for the district court on *four separate occasions* within the past two years. The procedure suggested here could not therefore possibly be considered either a burden to the Government or a hindrance of its ability fully to present its position to the Court.

CONCLUSION

The Motion to Accelerate Consideration should be granted.

Respectfully submitted,

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